

**STATE OF MAINE
SUPREME JUDICIAL COURT
NOTICE AND OPPORTUNITY TO COMMENT
ON
Proposed Amendments to
Maine Rules of Civil Procedure 93**

Comments Due on or Before Tuesday, December 1, 2009

The Supreme Judicial Court is considering a proposal to add Rule 93 to the Maine Rules of Civil Procedure in order to address rules related to the Foreclosure Diversion Program.

The Court invites comments on the proposed amendment. Any comments should be filed with the Clerk of the Supreme Judicial Court by December 1, 2009. Comments sent via e-mail may be in the text of an e-mail or in an attachment to an e-mail, addressed to: <mailto:lawcourt.clerk@maine.gov>. If the comments are in an attachment, the attachment must be a document in one of the following formats: plain text (.txt), Microsoft Word 1997-2004 (.doc), rich text format (.rtf), or portable document format (.pdf). The Clerk's Office will acknowledge receipt of the e-mail via a reply e-mail.

All comments must contain (1) the name, mailing address and telephone number of the individual submitting the comments; and (2) the name, mailing address and main telephone number of the organization (if any) on whose behalf the comments are submitted. An individual need not be an attorney to submit comments on behalf of an organization.

Dated: November 12, 2009

Maine Supreme Judicial Court
205 Newbury Street
Post Office Box 386
Portland, Maine 04112-0368
(207) 822-4146

***** DRAFT 11-12-09 *****

STATE OF MAINE
SUPREME JUDICIAL COURT

AMENDMENTS TO THE
MAINE RULES OF CIVIL PROCEDURE
[FORECLOSURE DIVERSION PROGRAM]

2010 Me. Rules --

Effective: January 1, 2010

All of the Justices concurring therein, the following amendment to the Maine Rules of Civil Procedure is hereby adopted to be effective on the date indicated above. The specific rules amendment appears below. To aid in understanding of this amendment, Advisory Notes appear after the text of the amendment. The Advisory Notes state the reasons for recommending the amendment, but the Advisory Notes are not part of the amendment adopted by the Court.

1. Rule 93 of the Maine Rules of Civil Procedure is adopted to read as follows:

RULE 93. FORECLOSURE DIVERSION PROGRAM

This Rule shall govern operation of the Foreclosure Diversion Program.

(a) Definitions. As used in this Rule, the following terms shall have the following meanings:

(1) “Foreclosure action” means any civil action initiated pursuant to title 14, chapter 713 of the Maine Revised Statutes (14 M.R.S. §§ 6101-6325) to foreclose on a property subject to a mortgage or other note or bond secured by that property, other than a State Mortgage pursuant to 14 M.R.S. §§ 6151-6153.

(2) “Owner-occupant” means an individual who is the mortgagor of a residential property that is that individual’s primary residence. The term may include: (A) two or more individuals who are joint mortgagors of that residential property, and (B) a mortgagor of a residential property who resided at that property as that individual’s primary residence within 180 days prior to commencement of the foreclosure action and has not established primary residence at another property subject to a mortgage with that individual as the mortgagor.

(3) “Primary residence” means a residential property that is an individual’s principal place of abode.

(4) “Residential property” means a single residential real property including: (A) not more than four residential units owned by the mortgagor, or (B) a single condominium unit owned by the mortgagor within a larger residential condominium property.

(b) Foreclosure Diversion Program Administration.

(1) *Actions Covered.* This Rule shall govern all foreclosure actions filed after December 31, 2009, against a defendant who is an owner-occupant. This Rule also shall govern all foreclosure actions that are filed on or before December 31, 2009, against defendants who are owner-occupants, and are ordered by the court to mediation pursuant to subsection (q) of this Rule.

(2) *Manager.* The Manager of the Foreclosure Diversion Program or designee, under the direction of the State Court Administrator, shall manage the Foreclosure Diversion Program and shall supervise the:

- (A) Establishment and support of the Foreclosure Diversion Program state-wide;
- (B) Identification and qualification of persons to be mediators in the Program;
- (C) Training and certification of individuals to be mediators pursuant to this Rule;
- (D) Trial court clerks' scheduling of mediations required or requested pursuant to this Rule;
- (E) Payment of mediators for services pursuant to this Rule;
- (F) Preparation and filing of reports about mediations conducted pursuant to this Rule and of such other reports and recommendations regarding the Foreclosure Diversion Program as may be required by the Supreme Judicial Court, or the State Court Administrator or designee; and
- (G) Development and implementation of policies, procedures, and forms to manage, evaluate, and report about the Foreclosure Diversion Program.

(3) *Mediators.*

(A) Active Retired Justices or Judges may be assigned by the Chief Justice or Judge of their courts to act as Foreclosure Diversion Program mediators after receiving the required training; and

(B) Other persons eligible to be certified as mediators pursuant to this Rule shall:

- (i) Be educated and experienced in the professions of law, accounting, banking, or mediation, and have work experience that includes foreclosures, credit and collections work, or have done work on behalf of creditors or debtors in actions to collect on mortgages, notes, or debts;

- (ii) Have successfully completed training provided by the Foreclosure Diversion Program;
- (iii) Have received a certificate of qualification to serve as mediators from the Foreclosure Diversion Program subject to such terms and conditions as deemed appropriate; and
- (iv) Have a laptop computer that is compatible with court printers for use at all mediation sessions. In the alternative, mediators may use laptops or other portable computers and portable printers.

(c) Foreclosure Diversion Program Participation Requirements

(1) *Answers: Request for Mediation.* Within 20 days after being served with a summons and complaint each defendant shall (i) serve an answer to the complaint on the plaintiff and (ii) file a copy of that answer with the court. To answer foreclosure complaints and request mediation, defendants may use the one-page form approved and developed by the Department of Professional and Financial Regulations, Bureau of Consumer Credit Protection, or may file an answer that complies with M.R. Civ. P. 12(a) and also requests mediation. If a defendant appears in or otherwise requests mediation in the action within 20 days after service of the summons and complaint, but does not file an answer to the complaint, mediation shall be scheduled in accordance with this Rule, and the deadline for filing an answer shall be extended until 20 days after a final mediation report is filed with the court or until 20 days after the court waives mediation.

(2) *Mediation.* The court will schedule a mediation session for each foreclosure action filed against a defendant who is an owner-occupant and who

appears in, answers, or otherwise requests mediation in the action within 20 days after service of the summons and complaint. It is within the court's discretion whether to schedule mediation in actions in which the defendant fails to timely appear, answer, or otherwise request mediation, and in which the defendant has not been defaulted pursuant to Rule 55.

(3) *Information Sessions.* The Foreclosure Diversion Program is authorized to design and implement information sessions, and the court may in its discretion schedule information sessions and order parties, counsel, and others to attend.

(4) *Financial Forms to be Provided.* In addition to the pleading requirements specified by statute and Court Rules, a plaintiff shall file and serve with the foreclosure complaint a set of financial forms requesting information from the defendant that would allow the plaintiff to consider or develop alternatives to foreclosure or otherwise facilitate mediation of the action. These forms may be forms designed by individual lenders or standardized forms developed by the federal government, a state agency, or some other group, provided that the forms sent by the lender are the forms that lender uses in considering or developing alternatives to foreclosure. With each set of financial forms served on a defendant, the plaintiff must include an envelope large enough to contain the forms. The

envelope shall be addressed to the plaintiff's attorney, to whom this information will be sent.

(5) *Completion and Return of Forms.* Not later than 21 days after the information session, if one is held, or not later than 42 days after service of the complaint, if no information session is held, each defendant shall complete and return a set of the forms referred to in paragraph (4), along with all other requested information, to the plaintiff's attorney in the envelope provided and shall also file copies of each document sent to the plaintiff's attorney with the court.

(d) Stay of Pending Actions.

(1) *Defendant Appears.* When a defendant, who is an owner-occupant, appears in, answers, or otherwise requests mediation within 20 days after service of the summons and complaint in a foreclosure action filed after December 31, 2009, any further proceedings in the foreclosure action, including deadlines in any scheduling order other than the informational session and mediation scheduling orders, shall be stayed until mediation is completed and a final mediation report is filed with the court. This stay shall not apply to efforts to enforce the production of information required by the mediator or service of pleadings upon other parties-in-interest.

(2) *Defendant Fails to Properly Appear.* When a court orders mediation in actions in which the defendant fails to timely appear, answer, or otherwise

request mediation, pursuant to subsection (c)(2) of this Rule, any further proceedings in the foreclosure action, including deadlines in any scheduling order other than the information session and mediation scheduling orders, shall be stayed until mediation is completed and a final mediation report is filed with the court. This stay shall not apply to efforts to enforce the production of information required by the mediator or service of pleadings upon other parties-in-interest.

(e) Timing of Information Session and Mediation.

(1) If the court requires a defendant or other party to attend an information session before mediation, the clerk shall issue a scheduling order setting the date of the information session to the defendant and any other party required to attend, and shall provide a copy of that scheduling order to the plaintiff.

(2) Not more than 7 days after the scheduled information session that the defendant was notified to attend, the clerk shall issue a foreclosure mediation scheduling order.

(3) When the court does not require the defendant to attend an information session, the clerk shall mail a foreclosure mediation scheduling order to the parties so as to not delay the start of the mediation process.

(4) Unless the parties agree otherwise, mediation shall be completed not later than 90 days after the clerk sends the mediation scheduling order to the parties.

(f) Contents of the Foreclosure Mediation Scheduling Order.

The scheduling order shall contain a list of information that the parties are required to file with the court, exchange with each other in advance, or bring to the mediation session(s).

(g) Mediation Issues.

The mediation shall address all issues of foreclosure, including but not limited to: (1) proof of ownership of the note and any assignments of the note; (2) calculation of the sums due on the note for principal, interest, and any costs or fees, reinstatement of the mortgage, and modification of the loan; and (3) restructuring of the mortgage debt. Foreclosure mediations shall utilize the calculations, assumptions and forms established by the Federal Deposit Insurance Corporation and published in the Federal Deposit Insurance Corporation Loan Modification Program Guide, as set out on the Federal Deposit Insurance Corporation's publicly accessible website.

(h) Participation in Mediation.

(1) A mediator shall include in the mediation process any person the mediator determines is necessary for effective mediation, including a property lien holder, other creditor or party-in-interest whose participation is essential to resolution of issues in the foreclosure. Mediation and appearance in person is mandatory for:

- (A) the defendant;
 - (B) counsel for the defendant, if represented;
 - (C) counsel for the plaintiff; and
 - (D) the plaintiff, or representative of the plaintiff, who has the authority to agree to a proposed settlement, loan modification, or dismissal of the action.
- When the plaintiff is represented by counsel who has authority to agree to a proposed settlement and is present, the plaintiff or its representative may participate by telephone or video.

(2) For persons who are not the plaintiff or the defendant in the pending civil action, participation is voluntary and the mediation shall proceed in the absence of such a person if that person declines to participate in the mediation.

(3) When a plaintiff participates by telephone, plaintiff's counsel shall ensure the quality of the connection is sufficient to allow clear communication for the duration of the session. Plaintiff's counsel may be required to furnish a speakerphone for use in the mediation room, or elsewhere. When telephone equipment is available, the plaintiff's counsel shall make arrangements at plaintiff's expense for reaching the plaintiff at a toll free number or through the use of automated conference call services. Plaintiff will comply with all requests contained in the mediation scheduling order, including requests for information about telephone participation or video participation. Requests for video participation must be made 10 days before the scheduled mediation session.

(i) Multiple Sessions.

Mediators are authorized to schedule additional or follow-up sessions, if necessary. Such sessions will be conducted in the same manner as the original

session, and will not extend the time limit to complete mediation set in subsection (e)(4) unless the parties agree to such an extension or the court finds that such an extension is necessitated by a lender's delay.

(j) Good Faith Effort.

If a plaintiff or defendant or attorney fails to attend or to make a good faith effort to mediate, the mediator shall inform the court, and the court may impose appropriate sanctions. Sanctions may include, but are not limited to, the assessment of costs and fees, assessment of reasonable attorney fees, entry of judgment, dismissal without prejudice, dismissal without prejudice with a prohibition on refiling the foreclosure action for a stated period of time, and dismissal with prejudice.

(k) Continuing or Canceling Mediation.

(1) If either party needs to have a mediation session continued, that party shall file a motion requesting such change with the court and serve a copy upon all opposing parties. If the motion is granted, the party requesting a continuance shall inform, in writing, all other parties and the mediator of any change approved.

(2) If the parties agree to a settlement and have filed a dismissal of the action at least 48 hours before the scheduled mediation, mediation will be cancelled by the clerk.

(3) If the plaintiff or the defendant or the mediator appears at the original mediation date and time because the party requesting the continuance failed to timely advise all other parties or the mediator, the offending party or counsel may be sanctioned.

(l) Location of Mediation Sessions.

Mediation sessions will be held at court locations, whenever possible. The Foreclosure Diversion Program Manager may approve use of an alternate site if the parties and mediator agree upon a location. The original case file shall not leave Judicial Branch buildings.

(m) Waiver of Mediation.

A defendant may request that mediation be waived by filing a completed “motion to waive” form with the court. If the defendant files that motion, the court may waive mediation only upon a finding by the court that:

- (A) there is good cause to waive mediation, and
- (B) the defendant is making a free choice to waive mediation after being informed of the options and services that may be available through mediation.

(n) Mediator Reports.

(1) Not later than 7 days following the mediation session, each mediator shall complete and file with the court a report for each mediation session, including follow-up sessions, conducted pursuant to this Rule.

(2) The mediator shall send copies of each mediation report to the Foreclosure Diversion Program and to the parties at the time of filing.

(3) In the final mediator's report, the mediator shall indicate that the parties fully completed the Net Present Value Worksheet found in the Federal Deposit Insurance Corporation Loan Modification Program Guide or explain the reasons why the parties did not complete this worksheet.

(4) If the final mediator's report indicates a failure to reach agreement or any result other than a settlement or dismissal of the case, the final report shall include the outcomes of the Net Present Value Worksheet and must note any points of agreement reached during the mediation.

(o) No Waiver of Rights.

No party waives any rights in the foreclosure action by participating in information sessions or foreclosure mediation.

(p) Information and Confidentiality.

(1) Parties shall submit all information required by the Foreclosure Diversion Program or Foreclosure Diversion Program mediator.

(2) Admissibility of evidence of statements made or discussions occurring during mediation is subject to M.R. Evid. 408(a).

(3) Disclosures by a mediator of statements or actions occurring during mediation or of information acquired during mediation shall be subject to the same limitations as are stated in M.R. Civ. P. 16B(k).

(4) Except for financial information included as part of the foreclosure complaint or any answer or response filed by the parties, any financial statement or information provided to the court or to the parties during the course of mediation is confidential and is not available for public inspection. Any financial statement or information shall be made available, as necessary, to the court, the attorneys whose appearances are entered in the case, and the parties to the mediation. Any financial statement or information designated as confidential under this subsection, if filed with the court, shall be sealed and kept separate from other court papers in the case and may not be used for any purposes other than mediation.

(5) Information needed for statistical purposes, and for the evaluation and improvement of the Foreclosure Diversion Program will be collected.

(q) Optional Availability of Mediation.

(1) In addition to those foreclosure actions for which mediation is mandatory pursuant to this Rule and 14 M.R.S. § 6321-A, a defendant who is an owner-occupant in any foreclosure action that was pending but had not yet resulted in final judgment as of January 1, 2010, may request by motion that the court order

mediation pursuant to this Rule. The court may order mediation pursuant to this Rule if:

- (A) after consulting with the Foreclosure Diversion Program Manager, the court determines that mediation resources are available to perform the mediation; and
- (B) the court finds that mediation will not unduly delay the proceedings or result in prejudice to the plaintiff.

(2) When optional mediation is ordered pursuant to paragraph (1):

- (A) the court may order the plaintiff to send the financial forms described in subsection (c)(4) of this Rule to the defendant;
- (B) the court may order the parties to attend informational sessions prior to mediation;
- (C) further proceedings in the foreclosure action shall be stayed pending the filing of the final mediator's report; and
- (D) in any action filed prior to June 15, 2009, the plaintiff shall pay the \$200 Mediation in Foreclosure action fee established in the Court Fees Schedule.

Advisory Notes

Rule 93 of the Maine Rules of Civil Procedure is adopted to implement, statewide, the foreclosure service and notice requirements adopted in 14 M.R.S. § 6111(1-A) and the foreclosure mediation program authorized in 14 M.R.S. § 6321-A. The Court is acting pursuant to its general rulemaking authority and specific authority to act on this issue established by 4 M.R.S. § 18-B(12). Rule 93 tracks fairly closely the Rule adopted for the Foreclosure Diversion Program Pilot Project in York County that was implemented by Administrative Order JB-09-03, effective August 3, 2009. This draft includes adjustments to recognize the experience gained in the Pilot Project.

Rule 93 includes sections (a) through (q) as follows:

Section (a) includes definitions of important terms.

-- the foreclosure action definition essentially covers the foreclosure provisions in title 14 M.R.S., excepting State mortgages;

-- the owner-occupant definition includes a look-back provision, not in the statute, to include people who may have left their home in the last six months because they could not afford to live in it and perhaps found a renter or abandoned the home. A person who has left their home could not qualify if they have assumed another mortgage;

-- the primary residence definition is based on case law addressing the residence issue, *see e.g., State v. Falcone*, 2006 ME 90, ¶¶ 7-11, 902 A.2d 141, 143-44;

-- the residential property definition follows 14 M.R.S. § 6321-A(3) as to what properties qualify, with the added reference to a single condominium unit, which could be in a larger than four unit building.

Section (b)(1) indicates that Rule 93 governs all foreclosure actions filed after December 31, 2009, against defendants who are owner-occupants. Rule 93 also may govern foreclosure actions filed before December 31, 2009 against defendants who are owner-occupants, but only when a court orders the parties to participate in mediation.

The Manager description section (b)(2) is self-explanatory.

The mediator description in section (b)(3) follows the statute in addressing active retired judges separately from others who may seek to be mediators. For others there are relevant education and experience qualifications described in (b)(3)(B).

Section (c) establishes filing, response and scheduling requirements for the program. Subsection (c)(1) addresses the requirement for defendants to file answers in addition to appearing in or otherwise requesting mediation in the action. Defendants who do not properly answer or otherwise respond may be subject to default pursuant to Rule 55.

Subsection (c)(2) generally establishes the mandatory mediation process for foreclosure actions filed after December 31, 2009 against defendants who are owner-occupants.

Subsection (c)(3) gives courts discretion to order defendants and others to attend information sessions before participating in mediation. The information

sessions, when they can be held, will attempt to educate individuals about the law, process and paperwork involved in foreclosure actions so that they may better understand their options as the action proceeds.

Subsections (c)(4) and (5) outline the duties of the plaintiff and defendant in coordinating the preparation and exchange of financial information needed for the parties to consider alternatives to foreclosure. The date the defendant must return the financial forms to plaintiff's counsel, with a copy of the forms sent to the court, is dependent upon whether the defendant is required to attend an information session.

Section (d) addresses stays of proceedings based on 14 M.R.S. § 6321-A(9) that requires that, when a defendant has responded to an action, there be no entry of judgment before mediation. A defendant who is properly served and does not respond to the action may be defaulted pursuant to Rule 55. However, subsection (d)(2) allows for the possibility of the court ordering mediation and a stay of proceedings in some cases when a defendant, who has been properly served and noticed, does not properly appear or otherwise respond. The Rule also allows the option to waive mediation, with court approval in section (m).

Section (e) describes the timing of notice to the parties regarding information sessions and mediation.

Section (f) authorizes the court to require parties to gather and exchange specific financial information in the foreclosure mediation scheduling order.

Section (g) outlines the issues to be addressed in mediation. It is based on 14 M.R.S. § 6321-A(3) with the proof of mortgage ownership and calculation of sums due issues added.

Section (h) addressing mandatory and discretionary participation in mediation is based on 14 M.R.S. § 6321-A(11) with lien holders and other essential creditors added. It also addresses requirements for remote participation in mediation sessions.

Section (i) authorizes mediators to schedule additional mediation sessions, if determined necessary by the mediator, provided that the time limit to complete mediation is not exceeded.

Section (j), the good faith provision is based on 14 M.R.S. § 6321-A(12). Although section (j) lists several sanctions available to the court, it is not meant to limit a court's authority to devise other forms of appropriate sanctions.

Section (k) outlines the procedure for parties to request continuances or cancellations of scheduled mediation sessions and to inform the mediator and other parties of such requests.

Section (l) specifies that mediations will be conducted at court locations, whenever possible. If the parties would prefer an alternate location, the parties and mediator must agree upon an alternate site before requesting permission from the Foreclosure Diversion Program Manager. Original case files may not be removed from Judicial Branch buildings.

Section (m) addresses waiver of mediation with court approval. Only defendants may request waiver of mediation.

Section (n) regarding mediation session reports is based on 14 M.R.S. § 6321-A(13), with an added reference to points of agreement to be reported.

Section (o) specifying that no party waives any rights by participating in mediation tracks 14 M.R.S. § 6321-A(5).

Section (p) addressing mediation confidentiality is based on 14 M.R.S. § 6321-A(4) with added reference to M.R. Evid. 408(a) and incorporating by reference M.R. Civ. P. 16B(k).

Section (q) authorizes courts in their discretion, and after consultation with the Foreclosure Diversion Program Manager, to order parties to foreclosure actions against defendants who are owner-occupants, that have been filed before January 1, 2010, and have not yet resulted in a final judgment to participate in mediation.

2. These amendments shall be effective January 1, 2010.

Dated: _____, 2009

FOR THE COURT¹

LEIGH I. SAUFLEY
Chief Justice

DONALD G. ALEXANDER
JON D. LEVY
WARREN M. SILVER
ANDREW M. MEAD
ELLEN A. GORMAN
JOSEPH M. JABAR
Associate Justices

*******END OF DRAFT PROPOSED RULE AMENDMENTS*******

¹ This Rules Amendment Order is approved after conference of the Court, all Justices concurring therein.